Supreme Court, U.S.
FILED
APR 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1428

IN THE
Supreme Court of the United States
OCTOBER TERM 1986

PHOENIX, NEWSPAPERS, INC. AND EDYTHE JENSEN
Petitioners,

v.

STEVE W. BOSWELL AND JIM MOFFORD
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

*KRAIG J. MARTON
Marton & Hall, P.A.
817 North Second Street
Phoenix, Arizona 85004
(602) 258-1771

ATTORNEYS FOR RESPONDENTS

*Counsel of Record

RESTATEMENT OF THE QUESTION

I. WHETHER THE APPELLATE OPINION AT ISSUE HERE IN ANY WAY CREATES A "PRESUMPTION OF NEGLIGENCE" IN THIS PRIVATE PERSON DEFAMATION CASE.

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THE SUPREME COURT OF ARIZONA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

This Court lacks the jurisdiction to hear the petition since it was untimely filed. Although the Petition purports to seek a Writ of Certiorari To The Supreme Court of Arizona, in fact it complains of an opinion of the Arizona Court of Appeals. Under Arizona law, the Court of Appeals' Opinion was final on the issues raised in the within Petition, on August 28, 1985, when the Arizona Supreme Court granted review on other issues, but not on the issue complained of now (see, Appendix A, August 28, 1985 Order of the Supreme Court). See Rule 23(f) Ariz. R. C. App. Proc.

Under 28 U. S. C. §2101(c) the Petition for Writ Of Certiorari should have been filed within ninety days of August 28, 1985. Since it was not, it is untimely and this

> "She said she was upset about it, and said, well, that was her mistake, she wished it hadn't occurred, and she was going to get it taken care of right away and get a retraction printed." (RT IV 481).

The reporter never disputed Mr. Munger's testimony at any point during the trial. For example, when she was asked:

> Q: You heard Stan [Munger] testify. Do you have any reason to doubt what Stan said when he was here under oath?

Her answer was:

> A: No , I don't (RT VI 1010).

Although she admitted the article was published as she wrote it (RT I 15), the reporter never really explained how she made the error:

> "I don't remember of the specifics of what Mr. Munger told me. I can just testify that this story appeared like that and it was wrong." (RT I 16-17)

The reporter did, however, admit that this was her mistake, and that it was serious:

> Q: "Edythe, this was a serious mistake that you made, wasn't it?
>
> A: Yes, it was.

Q: In fact, wasn't it just about the most serious mistake you have ever made as a reporter?

A: Yes, I would admit that." (RT I 22)

Not only did the reporter admit the error, her supervisors admitted her negligence as well. Victor Thornton, the City Editor of the newspaper at issue and her then supervisor, testified "it must have been an error of judgment." (RT II 76).

The managing editor of the newspaper also admitted that his reporter had been negligent. He first did so in a letter which was mailed to both of the Plaintiffs and their employer:

> "The information was taken from court records and your names were inadvertently reversed with those of Pete Kyle and Pat Lorman. We regret the error and apologize for any inconvenience it has caused."
> (RT II 110).

He later explained that the term "court record" in his letter meant "an officer of the court" —Mr. Munger (RT VI 980).

The Managing Editor also admitted that the reporter was not careful:

Q: "Was this careful?

A: She's a careful reporter, and tries not to make mistakes.

Q: I asked whether this was careful.

A: Well, it was an error, so it obviously wasn't careful, but she intends to be careful at all times." (RT VI 990).

In light of such evidence, it is difficult to understand how Petitioners can claim that the Arizona Courts found some presumption of negligence. Quite the opposite there was direct evidence of negligence, through admissions of the reporter, her city editor, and the managing editor.

REASONS FOR DENYING WRIT

I. *There Is No Special And Important Reason For Granting Any Review Here*

Conspicuously absent from the petition is any discussion of the considerations outlined in S. C. Rule 17.

The Arizona Court of Appeals' Opinion has no widespread significance. Its holding is related to a particular set of facts and circumstances not likely to be repeated.

II. *Neither The Opinion Below Nor The Record Create Any Presumption of Fault*

The fatal flaw in Petitioner's reasoning is their claim that they have been held "presumptively at fault." (Petition at 6). Not so.

The Arizona Court of Appeals recognizes throughout their Opinion that it was Respondent's burden to prove negligence. The Court accepted the view that "the uncontracted evidence established Appellee's negligence." (Opinion, Petitioner's Appendix A at 4a).

The Court also recognized "to prevail on a directed verdict motion here the evidence had to establish... negligence on the part of the publisher." (*Id.*)

There was no "presumption" of anything here. Rather, Petitioners were shown to have been negligent on undisputed facts. The Court of Appeals appropriately mandated that a directed verdict be entered.

CONCLUSION

For these reasons, the Petition For a Writ Of Certiorari should be denied.

Respectfully submitted this _____ day of April, 1987.

*Kraig J. Marton
MARTON & HALL, P. A.
817 North Second Street
Phoenix, Arizona 85004
(602) 258-1771

*Counsel of Record

APPENDIX A

IN THE
Supreme Court
STATE OF ARIZONA

STEVE W. BOSWELL AND JIM MOFFORD, *Plaintiffs/Appellants,*	)	No. 18159-PR
v.	)	ORDER
PHOENIX NEWSPAPER, INC., an Arizona corporation; and EDYTHE JENSEN, *Defendants/Appellees.*	)	

Pursuant to Rule 23(f) Ariz. R. C. App. Proc. the court grants review on the following issues:

1. Does Article XVIII §6 of the Arizona Constitution apply to common law defamation actions?

2. If so, by prohibiting (where there has *been* adequate retraction and no proof of malice) recovery of general damages for injury to reputation and emotional injury, does A. R. S. § 12-653.01 "abrogate" a "right of action for injuries" and thus violate Article XVIII, §6?

Counsel for Appellants may file a supplement brief on the foregoing issues on or before September 12, 1985.

Counsel for Appellees and counsel for the Amici may file reply briefs on the foregoing issues on or before September 26, 1985.

Oral argument of the case is set for October 11, 1985, at the College of Law, University of Arizona, Tucson, Arizona.

DATED this 28th day of August, 1985.

/s/ William A. Holohan
WILLIAM A. HOLOHAN, Chief Justice

c:
Kraig Marton, Esq., Marton & Hall
James F. Henderson, Esq. & Glen Hallman, Esq., Gust, Rosenfeld, Divelbess & Henderson
Paul F. Eckstein, Esq., & Alan H. Blankenheimer, Esq., Brown & Bain
Michael J. Meehan, Esq., Molloy, Jones, Donahue, Trachta, Childers &